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Narayanan Rajangam v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–251–10 OF 2012
BALIA YUSOF, MOHTARUDIN BAKI AND TENGKU MAIMUN JJCA
12 NOVEMBER 2014

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused person convicted for murder and sentenced to death — Defence of provocation — Allegation that there were series of incidents that culminated in act of provocation — Whether trial judge correctly ruled out defence of provocation — Whether standard of proof on defence correctly applied — Whether provocation could be cumulative — Penal Code s 300 Exception 1

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The appellant was charged for murdering his employer by slashing him with a parang. Two eye witnesses to the crime, SP2 and SP3, who both testified that they saw the appellant coming towards the deceased with a *parang* in his hand.

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The two further stated that just immediately before striking the blow, the appellant did utter words to the effect 'anak pelacur, 10 bulan tidak bayar gaji dan tidak mahu berikan passport'. Another witness, who was another employee of the deceased also saw the appellant holding a *parang* and chasing the deceased who was running toward his vehicle. After slashing the deceased, the

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appellant was seen running into the bungalow of the deceased nearby and coming out later carrying a jewellery box. A post mortem conducted on the deceased revealed that he suffered 18 injuries, mainly slash wounds. The cause of death was stated to be caused by a slash wound at the back of his head likely to be caused by a sharp heavy object such as a *parang* or a sword. It was the

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contention of the appellant that there were a series of incidents that culminated in the act of provocation such as not being provided with food, non-payment of salary, retention of passport, no work permit and the assault and verbal abuse being the incident which 'broke the camel's back'. The appellant was found guilty and was convicted and sentenced to death. In the present appeal, it was

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submitted that the trial judge had erroneously ruled out the defence of provocation and had, in so deciding, applied a wrong standard of proof on the defence. It was submitted that provocation could be cumulative.

Held, dismissing the appeal:

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(1) Whether the provocation was grave and sudden as to make an accused person lose or be deprived of his self-control was a question of fact. It must depend on the whole circumstances of the case. There was no basis to conclude that the case is an authority for the proposition that provocation can be cumulative. The court found there were a series of

grave provocation and it was 'the final provocation that was sufficiently grave and sudden to prevent the offence from amounting to murder' (see paras 15 & 32).

(2) There is no such thing as gradual and accumulated provocation that amounted to grave and sudden provocation. Devoid of its gravity and suddenness, a gradual and accumulated provocation is not sufficient to constitute a defence under Exception 1 to s 300 of the Penal Code ('Code') (*Che Omar b Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309). The court agreed with the findings of the trial judge that in all the circumstances of the case, the provocation was not sudden and grave to reduce the charge of murder against the appellant to one of culpable homicide not amounting to murder within the meaning of Exception 1 to s 300 of the Code (see paras 33 & 34).

[Bahasa Malaysia summary

Perayu dituduh membunuh majikannya dengan mengelar si mati dengan parang. Dua saksi kepada jenayah tersebut, SP2 dan SP3, yang kedua-duanya memberi keterangan bahawa mereka melihat perayu berlari ke arah si mati dengan parang ditangannya. Kedua-dua selanjutnya menyatakan bahawa sebelum memukul, perayu ada mengatakan perkataan-perkataan 'anak pelacur, 10 bulan tidak bayar gaji dan tidak mahu berikan passport'. Seorang lagi saksi, seorang lagi pekerja si mati juga nampak perayu memegang parang dan mengejar si mati yang berlari ke arah kenderaannya. Selepas mengelar si mati, perayu dilihat berlari masuk ke dalam banglo si mati yang berdekatan dan keluar kemudiannya membawa kotak barang kemas. Bedah siasat dilakukan ke atas si mati menunjukkan bahawa dia mengalami 18 tikaman, kesemuanya luka kelaran. Sebab kematian dinyatakan disebabkan oleh kelaran di bahagian belakang kepalanya disebabkan objek berat yang tajam seperti parang atau pedang. Ia adalah hujahan perayu bahawa terdapat siri kejadian yang diakhiri dengan tindakan provokasi seperti tidak diberi makanan, tidak dibayar gaji, penahanan pasport, tiada permit kerja dan serangan dan penyalahgunaan lisan sebagai kejadian yang mana 'broke the camel's back'. Perayu didapati bersalah dan disabitkan dan dijatuhkan dengan hukuman mati. Dalam rayuan ini, ia dihujahkan bahawa hakim perbicaraan telah secara salah mengetepikan pembelaan provokasi dan telah dalam memutuskan hukuman, menguna pakai standard bukti yang salah atas pembelaan. Ia dihujahkan bahawa provokasi mungkin menjadi kumulatif.

Diputuskan, menolak rayuan:

(1) Sama ada provokasi adalah marah besar dan mengejut sehingga membuat tertuduh kehilangan atau menafikan kawalan dirinya adalah persoalan fakta. Ia mesti bergantung ke atas keadaan keseluruhan kes. Tiada asas untuk memutuskan bahawa kes adalah autoriti untuk cadangan bahawa provokasi boleh menjadi kumulatif. Mahkamah mendapati bahawa

terdapat siri-siri provokasi marah besar dan ia adalah 'the final provocation that was sufficiently grave and sudden to prevent the offence from amounting to murder' (lihat perenggan 15 & 32).

(2) Tidak terdapat perkara seperti provokasi terkumpul dan beransur-ansur yang menjumlahkan kepada provokasi marah besar dan mengejut. Tanpa gravitinya dan dengan tiba-tiba, provokasi terkumpul dan beransur-ansur tidak mencukupi untuk membentuk pembelaan di bawah Pengecualian 1 kepada s 300 Kanun Keseksaan ('Kanun') (*Che Omar b Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309). Mahkamah bersetuju dengan dapatan hakim perbicaraan bahawa dalam kesemua keadaan kes, provokasi bukan mengejut dan marah besar untuk mengurangkan tuduhan membunuh terhadap perayu kepada satu homisid salah yang tidak menjumlahkan kepada pembunuhan dalam maksud Pengecualian 1 kepada s 300 Kanun (lihat perenggan 33 & 34).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Che Omar bin Mohd Akhir v PP [2007] 4 MLJ 309, FC (refd)
Lorensus Tukan v PP [1988] 1 MLJ 251; [1988] 1 CLJ 143, SC (refd)
Mancini v Director of Public Prosecution's [1941] 3 All ER 272, HL (refd)
PP v Lasakke [1964] 1 MLJ 56 (refd)
PP v Samer Klom Klom [1996] 2 CLJ 359, HC (refd)
R v Camplin [1978] AC 705, HL (refd)

Legislation referred to

Penal Code s 300, Exception 1

Appeal from: Criminal Trial No 45B-283–09 of 2011 (High Court, Shah Alam)

J Kuldeep Kumar (Athari Bahardin with him) (J Kuldeep Kumar & Co) for the appellant.
Tetralina Ahmad Fauzi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Balia Yusof JCA (delivering judgment of the court):

[1] The appellant was charged for murdering his employer by slashing him with a *parang*. There were two eye witnesses to the crime ('SP2' and 'SP3') who both testified that they saw the appellant coming towards the deceased with a

parang in his hand.

[2] The two further stated that just immediately before striking the blow, the appellant did utter words to the effect 'anak pelacur, 10 bulan tidak bayar gaji dan tidak mahu berikan passport'. Another witness, who was another employee of the deceased also saw the appellant holding a *parang* and chasing the deceased who was running toward his vehicle.

[3] After slashing the deceased, the appellant was seen running into the bungalow of the deceased nearby and coming out later carrying a jewellery box.

[4] A post mortem conducted on the deceased revealed that he suffered 18 injuries, mainly slash wounds. The cause of death was stated to be caused by a slash wound at the back of his head likely to be caused by a sharp heavy object such as a *parang* or a sword.

[5] The appellant was found guilty by the learned High Court judge. He was convicted and sentenced to death. He appeals to the Court of Appeal against the said conviction and sentence and upon hearing the same, this court had dismissed the said appeal.

[6] The issue raised by the appellant in this appeal centred mainly on the learned trial judge's consideration of the defence. It was submitted that the learned trial judge had erroneously ruled out the defence of provocation and had, in so deciding, applied a wrong standard of proof on the defence.

[7] We deem it appropriate to set out the defence of the appellant in some detail which are as follows:

> The appellant came to Malaysia and worked with the deceased, as a wireman. On the first day of work, ie 17 June 2010 he was taken to a temple at Kampong Perapat and also to a house at Kapar and was asked to do work such as mopping the floor and carrying goods. The deceased did not buy any food for him and he was only asked to do work. He described his relationship with the deceased as not cordial and was frequently scolded by the deceased. The deceased had taken away his passport and had promised to apply for a work permit but did not do so. After 4 months of working with the deceased he decided to run away from his place of work and then work at a car wash center for 13 days. He contacted his father in India and told his father what had happened and also informed his father that his passport was kept by the deceased. His father had promised him that he would get in touch with the agent in Malaysia to get back the passport from the deceased. The appellant stated he was badly treated by the deceased and has not been paid any salary. The appellant claim that he performed all kind of work as instructed by the deceased such as working on a tractor to transport oil palm fruits and also to do work at the temple and also wiring work. As he was not paid any salary by the deceased, a fellow worker named 'Ganesan', a nephew of the deceased had brought him vegetables and rice.

[8] On 11 June 2011, the deceased had assaulted him because he had asked for his salary and passport. He had contacted his father to inform that he was not being treated well by the deceased. The appellant said that his father had called the deceased and asked the deceased to return the passport. This had irked the deceased who later scolded the appellant. The deceased was alleged to have assaulted the appellant on his hand using a piece of object like a steel ruler. The deceased also abused him verbally with vulgarity by saying that he was a child of a prostitute and scolded him for calling his father. After the scolding the appellant went back to his room and told two other co-workers that he was assaulted by the deceased. His head was bleeding. The appellant further said that he was in pain and stayed alone in the said room that night. Whilst in the room, his father called and asked whether the deceased had come to see him to which the appellant replied that the deceased did come and had assaulted him. His father also asked whether he had made a police report, to which he replied it was not necessary and he will continue to work with the deceased.

[9] On the following day, 12 June 2011, Ganesan came to his room and he told Ganesan that he was assaulted by the deceased for asking the deceased for his salary and the return of his passport. Ganesan then took him to a clinic in Kapar for treatment.

[10] The doctor who treated the appellant ('SD3') testified that on 12 June 2011 the deceased had called him to inform that one of his workers had injured his right hand. The call was at about 11am. The appellant was brought to the clinic by an Indian man. According to SD3, the nature of the injury was a clear cut lacerated wound on the right hand on both sides – front and back. He was further told by the person who brought the appellant that the appellant had injured his hand while changing the bulb and fell down. The glass bulb broke and cut the appellant's hand. SD3 further testified that he put a question mark in a clinical note of the appellant as to the cause of the injury as he was not sure whether it was caused by a glass cut or by other object. He did ask the appellant what had caused his injury but the appellant did not answer and that was why he had put a question mark in the said clinical note. He treated the appellant by doing stitches on both sides of the hand and on the little finger. There were two injuries on the appellant's hand, one was at the wrist and the other was on the little finger.

[11] The appellant's father ('SD2') was the other witness called by the defence. In his evidence, SD2 stated that he had called the deceased to ask about the well being of his son. SD2 also stated that he had mentioned to the deceased that his son had not received his salary and further said that if the deceased does not want to pay the salary, to send the appellant back to India. SD2 also stated that on 11 June 2011 the appellant had informed him that he was not well and had remained in his room. On hearing that, SD2 tried to call

the deceased two or three times but of no avail. On the 12 June 2011 again he tried calling the deceased at about 6pm Indian time which was approximately about 8.30pm Malaysian time but there was no reply from the deceased.

[12] On the 13 June 2011 that is the day of the incident, SD2 said he called the deceased and the deceased said to him 'anak pelacur' (prostitute child) and handed the phone to the appellant and SD2 had a conversation with the appellant. In the said conversation, SD2 said the appellant had told him not to make frequent calls for fear that he would be assaulted by the deceased. SD2 further stated that the deceased took away the handphone from the appellant and the deceased had a conversation with him. In the said conversation, SD2 stated that the deceased had said; 'Anak pelacur dan dia lahir untuk kamu ke atau untuk orang lain. Sekiranya kamu menelefon saya lagi saya akan menghantar anak kamu sebagai mayat' to him. SD2 pleaded with the deceased not to do so and asked the deceased to just send this son back. Immediately thereafter, the deceased switched off the phone.

[13] The defence case is premised on Exception 1 to s 300 of the Penal Code which provides:

> Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

[14] In order to bring a defence of grave and sudden provocation within the Exception 1 to s 300 of the Penal Code, the following facts need to be established:

(i) The offender must have done the act whilst deprived of the power of self control;

(ii) He must have been so deprived by reason of the provocation;

(iii) The provocation must have been grave and sudden;

(iv) The provocation must not have been sought by the offender;

(v) The provocation must not have been sought by the offender as an excuse for doing the act;

(vi) The provocation must not have been given by anything done; either

(a) in obedience to the law; or

(b) by a public servant in the lawful exercise of his powers as such, or

(c) in the lawful exercise of the right of private defence.

[15] Whether the provocation was grave and sudden as to make an accused person lose his self control is a question of fact and not one of laws (see *Che*

A *Omar b Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309). In *Mancini v Director of Public Prosecution's* [1941] 3 All ER 272 it was stated that whether the provocation is grave and sudden, the test to be applied is an objective one that is to say what would be the effect of the provocation on a reasonable man. An unusually excitable or pugnacious individual is not entitled to rely on
B provocation which would not have led an ordinary person to act as he did. In applying the said test, two relevant factors must be considered namely:

(a) whether there is a cooling off period; and

C (b) the mode of resentment must bear a reasonable relationship to the provocation.

[16] The Supreme Court in *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251; [1988] 1 CLJ 143 had made an observation that:

D > The test to 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control (see also *KM Nanavati v State of Maharashtra* AIR 1962 (SC) 605).

E **[17]** What a reasonable man would do under the circumstances depends upon the customs, manners, way of life, traditional values, etc. In short, the cultural, social and emotional background of the society to which the accused belongs. It is for the court to decide in each case having regard to all the relevant
F circumstances. In order to succeed, the provocation must be, (a) grave and sudden; and (b) have, by its gravity and suddenness deprived the accused of the power of self-control.

[18] A reasonable man has been defined in *R v Camplin* [1978] AC 705 as
G 'an ordinary person of either sex, not exceptionally excitable or pugnacious, but possesses of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today'.

[19] The learned trial judge had found that no reasonable man belonging to
H the same class of society as the appellant and place him in the same situation in which the appellant was placed, would be so provoked as to lose his self control.

[20] In concluding that the defence of grave and sudden provocation does not apply, the learned trial judge had made the following finding at
I pp 245–246 of *rekod rayuan Jilid* 3:

> From the facts of the case, prosecution witnesses had testified that the fatal blow was struck at the hall in the deceased's bungalow and the deceased in order to ward off the fatal blow had taken refuge in the temple and the accused had followed the deceased to the temple and continued to inflict fatal blows on the deceased. The

fatal blows inflicted on the deceased do not bear a reasonable relationship to the provocation.

The accused on his part chose to say that he could not remember what happened after the utterance of the words by the deceased. But there were evidence to show that the accused had threatened the prosecution witnesses who tried to intervene to help the deceased as the deceased came out from the bungalow to the temple.

The Court was of the view that whilst agreeing that the accused's father had made a call to the deceased at 8.30pm on the 13th June, 2011, there was insufficient evidence before the Court to indicate that the utterance amounted to a sudden and grave provocation. The call was made at about 8.30pm whilst the fatal assault on the deceased at about 10pm. There was sufficient cooling off period between the utterance made at about 8.30pm and the fatal blow on the deceased at about 10pm. There should not be a lapse between the alleged utterance of vulgarity and the act of inflicting the fatal blows on the deceased.

The provocation must be 'grave and sudden' not mulling on what action to take. Where did the accused get the lethal weapon i.e the parang to inflict fatal blows on the deceased? When the accused was at the temple prior to the incident, he did not carry any parang. The accused must have been looking for the parang and then came back to the bungalow where the deceased was seated on a sofa in the hall of the bungalow and inflicted fatal blows on the deceased without any provocation by the deceased. This was premeditation.

The Court hereby ruled that based on the facts, rejected the defence of provocation by the accused.

[21] Having rightly stated the principles of law on the application of the defence of provocation, we see no reason to disturb the learned trial judge's finding and we do not find any sufficient reason to interfere with His Lordship's assessment of the evidence and the findings of fact made upon the same.

[22] As to what exactly happened during the incident on the fatal night of 13 June 2011, beside saying there was a phone call and the deceased was scolding him and his father with vulgarities, and that just before that he was mopping the floors, the appellant merely said 'Semasa marah saya dalam keadaan sedar diri tapi lepas itu saya tidak tahu apa berlaku'.

[23] During cross-examination by learned deputy public prosecutor, the appellant stated 'Saya tidak tahu sama ada saya ada menetak Dato' and he denied running away with jewelleries using the deceased's vehicle, the Mitsubishi Storm. Taken in its totality, the learned trial judge was right in concluding that there were some elements of premeditation and more so when the evidence of SP2 and SP3 show that the appellant was seen coming towards the deceased with a *parang* in his hand while the deceased was seated in the hall. SP2 and SP3 also witnessed the appellant pursuing the deceased to the temple and running towards his vehicle.

[24] It ought to be noted that in respect of the calls made by SD2 to the deceased, the prosecution had recalled ASP Chua Hang Loun ('SP17') as a rebuttal witness. Specifically on the purported call made by SD2 to the deceased on 13 June 2011, the witness said at pp 174–175 *rekod rayuan Jilid* 2:

> Q:Terdapat satu panggilan telefon daripada ayah OKT (SD2) kepada Dato' Anbalagan pada 13.6.2011 jam lebih kurang 8.30 malam. Adakah kamu siasat samada ada panggilan dibuat.
>
> J: Saya ada terima 1 HP daripada isteri simati. No. HP 019-6451330 dan telah meneliti panggilan masuk dan keluar dan panggilan tidak dijawab. Saya dapati tiada terdapat panggilan daripada luar pada tarikh dan waktu tersebut.
>
> Pada 14.6.2011 saya semak dan dapati tiada panggilan dibuat daripada luar. Saya tidak membuat siasatan terhadap syarikat telekomunikasi tentang panggilan ini. Selepas saya check saya letak di dalam bilik saya.
>
> Q: Kenapa tidak siasat dengan syarikat telekomunikasi?
>
> J: Pada pendapat saya isu panggilan telefon tidak menjadi isu dan OKT tidak membangkitkan tentang adanya panggilan dibuat oleh ayah OKT ke HP Dato' Anbalagan. Jadi tiada isu panggilan telefon dibangkitkan semasa siasatan dan rakaman dibawah S.112 KAJ.
>
> Pada minggu lepas saya ada membuat permohonan kepada Celcom Klang untuk mendapatkan bil terperinci dan diberitahu bahawa talian yang tidak aktif selepas 3 bulan tiada ada bil yang boleh dibuat.
>
> Pihak Pendakwa ingin kemukakan satu set HP jenis Nokia-kepunyaan simati dikemukakan sebagai P88 dan di dalam P88 mengandungi senarai panggilan keluar dan masuk.
>
> Pada 13.6.2011 ada panggilan diterima pada jam 3.55 petang daripada 03-88801000. Lepas itu tiada rekod.
>
> Senarai panggilan ke luar/masuk dalam P88 ditandakan sebagai P89.

[25] During cross-examination by the appellant's counsel, this rebuttal witness stated that he received the deceased's handphone at 4am on 14 June 2011 and frankly admitted that any record of incoming call on the same could have been deleted. At p 176 of the same *rekod rayuan* this witness said:

> Setuju butiran incoming call boleh dipadamkan dengan menekan satu butang. Pada P88 memang ada butang untuk dipadamkan. Setuju kalau simati ada delete incoming call, saya tidak tahu. Saya terima HP pada awal pagi 14 June 2011 jam 4 pagi itu dalam tempoh 7 jam. Ya, kalau dalam tempoh 7 jam HP ini telah diusik saya tidak tahu.

[26] In our view, this is purely hypothetical. There is no evidence to suggest that any deletion of any incoming call to the said handphone was forthcoming.

Considering this piece of evidence with the record of incoming and outgoing calls in P89, it would seem that the evidence of the rebuttal witness is more probable.

[27] It was the contention of the appellant that there were a series of incidents which started on the 11 June 2011 that culminated in the act of provocation such as not being provided with food, non-payment of salary, retention of passport, no work permit and the assault and the verbal abuse on the night of 13 June 2011 being the incident which 'broke the camel's back'. According to the defence, the provocation took place in the form of utterance of vulgarity about the accused himself, his father and his mother. This was said to have occurred during the conversation that took place on the night of the incident at about 8.30pm Malaysian time. Learned counsel submitted that provocation can be cumulative.

[28] In advancing his arguement, learned counsel referred to a passage in *Public Prosecutor v Samer Klom Klom* [1996] 2 CLJ 359 in a judgment by Sir Denys Roberts CJ and Hayati J of the Brunei High Court. At p 372 of the report it was stated:

> The mental background created by the previous conduct or words of the victim may also be taken into account in ascertaining whether a subsequent act could be said to have caused grave and sudden provocation.
>
> This means that provocation can be cumulative (see *Public Prosecutor v Lasakke* [1964] MLJ 56) in the sense that previous acts may bring a defendant to a point at which he loses control because the last act, though insufficient in itself is the final straw which breaks the back of a camel which is already carrying a heavy load from previous provocations, though the final act of provocation must be of a nature which can reasonably be said to revive the earlier ones – e.g. a later reference to debt might revive earlier reference to money, but it would not revive an earlier accusation of sexual inadequacy.

[29] In *Public Prosecutor v Lasakke* [1964] 1 MLJ 56, it was held:

> The series of grave provocation deprived the accused of his power of self-control and the final provocation having regard to all the circumstances of the case was sufficiently grave and sudden to prevent the offence from amounting to murder.

[30] We ought to remind that whether the provocation is grave and sudden as to make an accused person lose or be deprived of his self-control is a question of fact. It must depend on the whole circumstances of the case. In *Public Prosecutor v Samer Klom Klom* the court found 'that a reasonable man of the accused's community would not be so provoked by what had happened or been said as to lose control of himself. The rejection of a man by his mistress is not uncommon. It cannot, without more, constitute such a degree of provocation

as would cause a loss of self-control in a reasonable man'. The court rejected the defence of grave and sudden provocation and found him guilty of murder.

[31] In *Public Prosecutor v Lasakke*, the accused was found not guilty of murder but guilty of culpable homicide not amounting to murder. The deceased had on three occasions tried to have sexual intercourse with the accused's wife and had told the wife to marry him and threatened that if her husband would not divorce her, he would kill him to achieve his purpose. The last occassion was about a month before the death of the deceased. On the day in question, the deceased said to the accused 'Eh? Have you divorced your wife yet? Later, while they were in the room, the deceased again hounded the accused with the word 'Eh. Are you not ashamed? Don't you realise all your friends know I have interfered with your wife? Why don't you divorce her? The accused did nothing but tears of shame came into his eyes, the accused decided to go home but as he reached the steps, the deceased who was standing there held him and struck him on the forehead. According to the witnesses, both the accused and the deceased were seen struggling for possession of a *parang* on the verandah near the door. The witnesses, on seeing this, ran away. When they returned the deceased body was found lying on the grass some distance from the house. The deceased suffered severe cut on his head and several other wounds. The court found that the accused was at that moment deprived of the power of self-control as the act of provocation was, having regard to all the circumstances sufficiently grave and sudden.

[32] In our considered view, the passage referred to and relied upon by learned counsel in the Brunei case of *Public Prosecutor v Samer Klom Klom* does not state the correct proposition of law as decided in *Public Prosecutor v Lasakke*. The facts of the case clearly reveals the gravity of the provocation. The provocation which the court took into consideration was the one that happened on the day of the murder itself. Reading the judgment of Simpson J, we found no basis to conclude that the case is an authority for the proposition that provocation can be cumulative. The court found there were a series of grave provocation and it was 'the final provocation that was sufficiently grave and sudden to prevent the offence from amounting to murder'. We are not inclined to agree and are least persuaded by *Public Prosecutor v Samer Klom Klom*.

[33] We are however cognisant of what had been expressed by the Federal Court in the judgment of Nik Hashim FCJ in the case of *Che Omar bin Mohd Akhir v Public Prosecutor* who opined that 'there is no such thing as gradual and accumulated provocation that amounts to grave and sudden provocation. Devoid of its gravity and suddenness, a gradual and accumulated provocation is not sufficient to constitute a defence under Exception 1 to s 300 of the Penal Code'. The Federal Court also found in the case, the brutal retaliation by the

appellant was not proportionate to the provocation and that a reasonable man placed in the situation and circumstances the appellant was placed, would not have acted as the appellant did.

[34] For the reasons aforesaid, we are in agreement with the findings of the learned trial judge that in all the circumstances of the case, the provocation is not sudden and grave to reduce the charge of murder against the appellant to one of culpable homicide not amounting to murder within the meaning of Exception 1 to s 300 of the Penal Code.

[35] We unanimously dismissed the appeal and affirmed the conviction and sentence by the High Court.

Appeal dismissed.

Reported by Afiq Mohamad Noor